

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>VICKY BERBERICH</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,003,648
<b>USD 609 SE KS REGIONAL EDUCATIONAL CENTER</b>	)	
Respondent	)	
AND	)	
	)	
<b>KANSAS ASSOCIATION OF SCHOOL BOARDS WC FUND, INC.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the September 16, 2009, Post Award Medical Award of Administrative Law Judge Kenneth J. Hursh (ALJ). Claimant was awarded post-award medical treatment for the injuries to her neck and right shoulder from the March 15, 2001, injury suffered in Docket No. 1,003,648. This medical treatment was ordered provided by authorized physician Paul S. Stein, M.D. The ALJ also ordered respondent to provide claimant with ongoing medications as recommended by Dr. Morehead.<sup>1</sup>

Claimant appeared by her attorney, William L. Phalen of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, Anton C. Andersen of Kansas City, Kansas.

The Board has considered the record and adopts the stipulations as set forth in the Post Award Medical Award of September 16, 2009. The Board also considered the record and stipulations as set forth in its Order of September 18, 2006.

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<sup>1</sup> Post Award Medical Award of September 16, 2009, at 3.

**ISSUES**

Respondent alleges the ALJ erred in his finding that claimant is entitled to post-award medical treatment related to the injury in Docket No. 1,003,648.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Post-Award Medical Award of the ALJ should be affirmed.

Claimant suffered an accidental injury arising out of and in the course of her employment with USD 609 on March 15, 2001, when an autistic child she was working with grabbed her right arm. Claimant suffered injuries to her right shoulder and neck and was awarded benefits by Administrative Law Judge Jon L. Frobish for a 13 percent permanent partial whole body disability.<sup>2</sup> The Board, in its Order of February 20, 2004, increased the disability to a 17 percent permanent partial whole body disability. In the May 24, 2006, Post-Award Medical & Preliminary Order of Judge Hursh, claimant was allowed additional medical treatment for her neck condition as recommended by Paul S. Stein, M.D., a board certified neurological surgeon.

Claimant filed an Application For Post Award Medical K-WC E-4 (E-4) on November 13, 2008, requesting additional medical treatment as recommended by Dr. Stein, and claimant filed another E-4 on November 17, 2009, requesting payment of prescriptions. The second E-4 does not specify which doctor prescribed the prescriptions for which payment is claimed. A Post-Award Hearing was held December 19, 2008, and completed with claimant's deposition on July 14, 2009. A Post Award Medical Award was issued by Judge Hursh on September 16, 2009, granting claimant's request for additional testing and ongoing medical treatment on claimant's neck and right shoulder per the recommendations of Dr. Stein. This included the use of a microcurrent stimulator for the right shoulder. As is noted in the Post Award Medical Award of the ALJ, respondent has authorized Dr. Morehead to provide and monitor claimant's medications.<sup>3</sup> Respondent does, however, dispute the need for a microcurrent stimulator as it relates to the treatment of claimant's shoulder from the March 15, 2001, accident.

Dr. Stein, in his April 30, 2009, deposition, opined that claimant continued to have problems with her right shoulder from the 2001 injury. He recommended ongoing analgesic medication, which has been authorized by respondent with Dr. Morehead. There remains a dispute with regard to the cause of claimant's ongoing neck pain. Dr. Stein has,

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<sup>2</sup> Award of Administrative Law Judge Jon L. Frobish dated August 7, 2003.

<sup>3</sup> Post Award Medical Award of September 16, 2009, at 2.

all along, questioned the cause of claimant's neck pain, finding it more likely to stem from claimant's degenerative condition rather than the 2001 injury. This opinion from Dr. Stein has been regularly rejected by Judge Frobish, Judge Hursh and the Board in the past. There is nothing contained in the recent opinion of Dr. Stein to change that finding.

Claimant requests the medications ordered by his family physician, Dr. Bean,<sup>4</sup> be paid as authorized. Dr. Stein has raised a serious question regarding the amounts and types of medications currently being administered to claimant. Respondent has authorized Dr. Morehead as the treating physician for the purposes of administering pain medication and this referral has been ordered by Judge Hursh. Hopefully, this will answer the concerns raised by Dr. Stein with regard to claimant's medications. Claimant's request for the payment of Dr. Bean's medications as authorized was not addressed by the ALJ and will, therefore, not be addressed by the Board at this time. This issue will be remanded to the ALJ for further proceedings.

#### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>7</sup>

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.<sup>8</sup>

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<sup>4</sup> Claimant's Submission Letter to the ALJ at 2.

<sup>5</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> K.S.A. 44-501(a).

<sup>8</sup> *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

The Board finds that the Post Award Medical Award issued on September 16, 2009, should be affirmed. Claimant has shown the need for ongoing medical treatment for both her right shoulder and neck stem from the injuries suffered on March 15, 2001.

#### **CONCLUSIONS**

The Post Award Medical Award of the ALJ should be affirmed as claimant has proven that the physical problems in her right shoulder and cervical spine stem from the March 15, 2001, injury suffered while claimant worked for respondent.

#### **ORDER**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Post Award Medical Award of Administrative Law Judge Kenneth J. Hursh dated September 16, 2009, should be, and is hereby, affirmed in part and remanded to the Administrative Law Judge for further hearings regarding the request for authorization of the medical treatment prescribed by Dr. Bean.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge